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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1150

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners,*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF ON BEHALF OF PILOT FREIGHT CARRIERS, INC., RESPONDENT.

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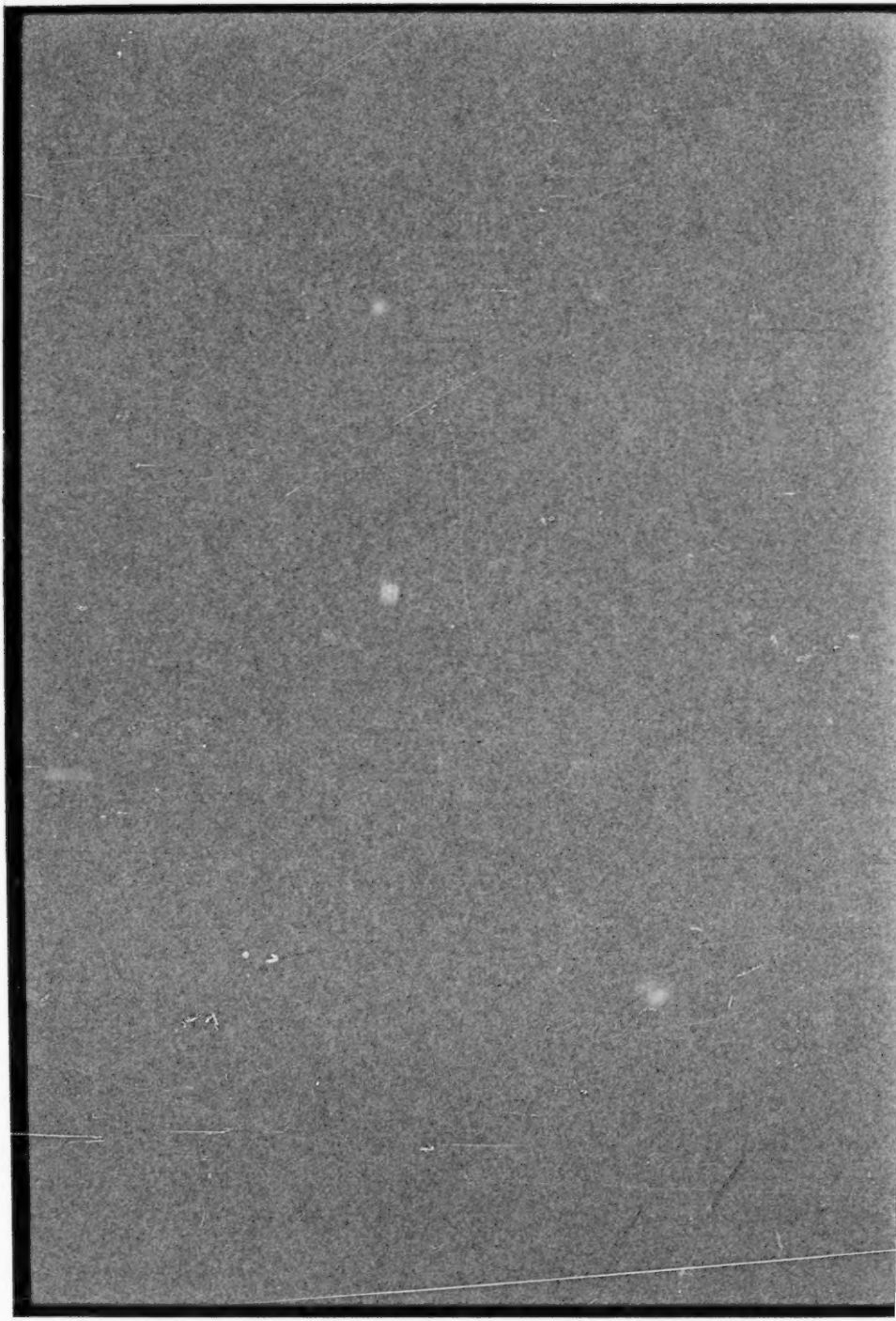

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1159

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners,*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF ON BEHALF OF PILOT FREIGHT CARRIERS, INC., RESPONDENT.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Florida, reprinted in App. A, pp. 1a-2a, as appended to the Petition, is unreported, and the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 506 F.2d 914.

JURISDICTION

The jurisdiction of this Court is correctly predicated upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly ruled that, on the facts of this case, the District Court correctly refused to vacate the plaintiff's Notice of Dismissal filed pursuant to Rule 41(a)(1), F.R.Civ.P.?

RULE INVOLVED

This Petition involves Rule 41(a)(1) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The factual background, together with the significant developments of this case in the lower courts, are adequately stated in Petitioner's Petition at pages 2 through 5.

ARGUMENT

I.

Where Defendant Has Filed Neither an Answer Nor a Motion for Summary Judgment, Rule 41(a)(1), F.R.Civ.P., Affords Plaintiff an Absolute Right To Dismiss Its Lawsuit.

Before Petitioners had filed either an answer or a motion for summary judgment, Respondent voluntarily dismissed its case by filing, pursuant to the provisions of Rule 41(a)(1), F.R.Civ.P., a Notice of Dismissal. The District Court ruled that this filing automatically dismissed Respondent's case, the Fifth Circuit affirmed, and this Court should not disturb those rulings.

Rule 41(a)(1), in its entirely, states:

> Subject to the provisions of Rule 23(e), of Rule 66, and any statute of the United States, *an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of*

> *a motion for summary judgment, whichever first occurs,* or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or included the same claim.

(emphasis added). Thus, as the Fifth Circuit stated in its opinion below, Rule 41(a)(1) "on its face grants a plaintiff an unconditional right to dismiss his complaint by notice and without order of the court at any time prior to the defendant's service of an answer or motion for summary judgment." 506 F.2d at 915. In the instant case, Respondent voluntarily dismissed its suit by filing a Notice of Dismissal. At the time of filing, Petitioners had filed neither an answer nor a motion for summary judgment. Hence, the Notice of Dismissal was properly and timely filed, and its force and effect under Rule 41(a)(1) should not be open to question. Rule 41(a)(1) means precisely what it says, no more and no less, and this Court should decline Petitioners' invitation to depart from its clear and unambiguous language.

II.

The History of Rule 41(a)(1), F.R.Civ.P., Offers No Support for Petitioners' Proposed "Exception" to That Rule.

In an effort to avoid the controlling language of Rule 41(a)(1), Petitioners contend that this Court should create a "judicial exception" to that Rule: Where the District Court has considered the merits of a plaintiff's case in a hearing upon a motion for a preliminary in-

junction, the plaintiff should not be permitted to dismiss its case automatically under Rule 41(a)(1). The creation of such an "exception" would, however, be contrary to the common-law and statutory history of Rule 41(a)(1).

At common law, a plaintiff had an absolute right to dismiss his suit without prejudice at any time before either verdict or judgment. *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924); *Barrett* v. *Virginian Ry. Co.*, 250 U.S. 473 (1919); *United States* v. *Norfolk & Western Ry.*, 118 F. 554 (4th Cir. 1902). Abuse of this right, however, often produced highly inequitable results. Plaintiffs would put defendants to the expense of a lengthy trial, only to dismiss when an adverse judgment seemed imminent. To curb these abuses, Rule 41(a)(1) was included in the first set of Federal Rules of Civil Procedure, effective September 16, 1938.

Under the 1938 version of Rule 41(a)(1), a plaintiff could voluntarily dismiss his suit by filing a Notice of Dismissal at any time before service of the answer. As originally drawn, however, Rule 41(a)(1) permitted voluntary dismissal by notice after a defendant had served a motion for summary judgment but before it had served an answer. In response to this defect, Rule 41(a)(1) was amended in 1946 to permit a plaintiff to dismiss his suit by Notice of Dismissal only before an adverse party had served either a motion for summary judgment or an answer.

Rule 41(a)(1) has not since been changed. If Congress had intended that a plaintiff be deprived of his absolute right to dismiss by any act of an adverse party other than the serving of an answer or a motion for summary judgment, it would have specified those cir-

cumstances in the statute. As the Fifth Circuit recognized in its opinion below,

> [s]ince the substantial likelihood of plaintiff's success on the merits is one of the factors which must always be weighed by the district court in exercising its discretion to grant or withhold preliminary injunctive relief, (citation omitted), . . . [Petitioners'] . . . view would amount to no less than a flat amendment of Rule 41(a)(1) to preclude dismissal by notice in any case where preliminary injunctive relief is sought.

506 F.2d at 916-17.

III.

The Decision of the Court of Appeals for the Fifth Circuit in This Case Presents No Conflict Among the Courts of Appeal on the Interpretation To Be Given Rule 41(a)(1), F.R. Civ.P.

In its decision below, the Fifth Circuit plainly held that, even were it persuaded that the decision of the Second Circuit in *Harvey Aluminum, Inc.* v. *American Cyanamid Co.*, 203 F.2d 106 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953), was correct, "the equitable considerations which apparently motivated the *Harvey* decision are not present in this case." 506 F.2d at 916. Accordingly, no decisional conflict among the Courts of Appeal requires resolution by this Court.

In *Harvey Aluminum*, plaintiffs filed suit seeking specific performance of an alleged contract. After a lengthy hearing that consumed four days, produced a record of some 420 pages of testimony and oral argument, and cost defendants over $84,000, the District Court denied preliminary injunctive relief. Plaintiffs then filed a Notice of Dismissal, and the District Court denied defendants' motion to vacate that Notice.

On appeal, the Second Circuit reversed, holding that the District Court, in refusing to vacate the Notice of Dismissal, had not complied with the "essential purpose" of Rule 41(a)(1):

> The purpose of this rule (Rule 41(a)(1)) is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined. . . . *The amount of research and preparation required of defendants was stressed by the Committee Notice when Rule 41(a)(1) was amended in 1948 as a reason for adding the reference to a motion for summary judgment. . . . The hearing . . . on the plaintiffs' motion for preliminary injunctive required several days of argument and testimony, yielding a record of some 420 pages.* Further, the merits of the controversy were squarely raised and the district court in part based its denial of the injunction on its conclusion that the plaintiff's chance of success on the merits was small. Consequently, although the voluntary dismissal was attempted before any paper labeled "answer" or "motion" for summary judgment" was filed, a literal application of Rule 41(a)(1) to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached.

203 F.2d 107-108 (emphasis added). The Second Circuit then remanded the case to the District Court with directions to vacate the Notice of Dismissal and, further, granted plaintiffs leave to move to dismiss the action under Rule 41(a)(2).[1]

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[1] Rule 41(a)(2), F.R.Civ.P., provides that, unless the provisions of Rule 41(a)(1) apply, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Although unclear in the Petition for Certiorari, Petitioners apparently contend that the District Court should have proceeded under Rule 41(a)(2) here.

In the instant case, unlike the *Harvey Aluminum* decision, there was no massive investment of time, preparation, and expense that could possibly justify disregarding the clear, unambiguous statutory language of Rule 41(a)(1). In *Harvey Aluminum, the* four-day hearing on the plaintiffs' motion for preliminary injunctive relief, together with the 420-page record and the $84,000 in costs for the defendants, established strong equitable considerations for the defendants. In the case before this Court, though, Petitioners have not made, and cannot make, such a strong showing of prejudice. The hearing on Respondent's motion for a temporary restraining order required slightly more than two hours; no witnesses testified for either side; and no massive, expensive record resulted from the hearing. Petitioners have never argued, to the District Court, to the Fifth Circuit, or to this Court, that the facts of the instant case are equivalent to those in *Harvey Aluminum,* nor can they.

The facts of the *Harvey Aluminum* decision were highly unusual, involving a voluntary dismissal after the plaintiffs' case had practically been tried, and the facts of the instant case in no way require or support the application of the so-called *Harvey Aluminum* "exception" to the clear, compelling language of Rule 41(a)(1). The *Harvey Aluminum* decision was the result of an aberrant set of facts, and the Second Circuit's decision should be restricted, if followed at all, to cases of a similar nature and factual setting.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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